Shanmugan Paramsothy v Thiagarajah Pooinpatarsan & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1–25–42 OF 2000
KC VOHRAH J
23 JUNE 2001

Arbitration *— Award — Error on face of record — Whether award may be set aside — Whether remedy of error on face of record available under Malaysian law*

The preliminary issue in this case was whether the applicant may rely on an error on the face of the record to set aside an award of the arbitrator. It was argued that the Arbitration Act 1952 ('the Act') does not provide for such remedy and therefore the remedy could not be engrafted on the Act.

Held, overruling the objection:

The courts in Malaysia have regularly considered arbitration applications on the basis that the remedy of error on the face of the award is available for consideration under Malaysian law (see p 310A); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, *Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min* [1980] 1 MLJ 291, *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 and *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 followed. The availability of the common law remedy is so deeply entrenched in Malaysian law that short of a provision similar to s 1(1) of the English Arbitration Act 1979 (which provides that the High Court shall not have jurisdiction to set aside or remit an award in the arbitrator's agreement on the ground of errors of fact or law on the face of the award), Malaysian courts have the jurisdiction to set aside an award on the ground of error of law on the face of the award (see p 310C–D).

[**Bahasa Malaysia summary**

Persoalan penting dalam kes ini adalah sama ada pemohon boleh bergantung kepada satu kesilapan pada zahir rekod (error on the face of the record) untuk mengetepikan satu award timbangtara. Ia dihujahkan bahawa Akta Timbangtara 1952 ('Akta tersebut') tidak memperuntukkan remedi sedemikian dan oleh itu remedi tersebut tidak boleh digrafkan pada Akta tersebut.

Diputuskan, menolak bantahan tersebut:

Mahkamah-mahkamah di Malaysia biasanya menganggap permohonan-permohonan timbangtara berdasarkan remedi untuk

kesilapan pada zahir award boleh dipertimbangkan di bawah undang-undang Malaysia (lihat ms 310A); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, *Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min* [1980] 1 MLJ 291, *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 dan *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 diikut. Remedi *common law* yang sedia ada begitu kukuh dalam undang-undang Malaysia di mana tanpa peruntukan yang sama seperti s 1(1) Akta Timbangtara 1979 England (yang memperuntukkan bahawa Mahkamah Tinggi tidak sepatutnya mempunyai bidang kuasa untuk mengetepi atau meremitkan satu award dalam perjanjian timbangtara atas alasan terdapat kesilapan fakta atau undang-undang pada zahir award tersebut), mahkamah-mahkamah di Malaysia mempunyai bidang kuasa untuk mnegetepikan satu award atas alasan terdapat kesilapan pada zahir award tersebut (lihat ms 310C–D).]

Notes

For cases on award generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 917–984.

Cases referred to

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min [1980] 1 MLJ 291 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Legislation referred to

Arbitration Act 1979 s 1(1) [Eng]
Arbitration Act 1952 ss 23, 24
Arbitration Ordinance 1950
Arbitration Ordinance of Sabah
Arbitration Ordinance of Sarawak
Arbitration Ordinance (Extension) Order 1972
Rules of the High Court 1980 O 69

Romesh Abraham (*Sujata Balan* with him) (*Shook Lin & Bok*) for the applicant.

RD Rajasingam (*B Murali* with him) (*Lewis & Co*) for the respondents.

KC Vohrah J. : I have to decide a preliminary point in this case — whether the applicant may rely on an error on the face of the record to set aside an award of an arbitrator.

The notice of motion is for an order to set aside an award made by an arbitrator on 24 March 2000, in respect of arbitration proceedings between the applicant and the respondents. Alternatively, the applicant requests the court to order the award to be remitted for reconsideration by the arbitrator. The reason for the application is stated as the arbitrator 'erroneously stating and/or applying the principles of law in his award'.

The notice of motion shows the application was made under ss 23 and 24 of the Arbitration Act 1952 ('the Act') and under O 69 of the Rules of the High Court 1980 ('the RHC').

During the hearing of the notice of motion, counsel Mr Romesh Abraham for the applicant abandoned his reliance on s 23 of the Act (on misconduct of arbitrator on award being improperly procured) and on the Act. When pressed by Mr RD Rajasingham, Mr Abraham said that he was applying to set aside the award solely on the ground that there was error on the face of the award. He conceded that the ground 'error on the face of the record' is not provided for anywhere under the Act and that it was a common law ground but submitted that that ground has been accepted as a good ground in Malaysia to set aside an award.

Before I go further, I would need to set out the brief facts of the subject matter of the award.

The arbitration proceedings relate to a clinic which is owned and operated by the third respondent company. The applicant and the first and the second respondents are directors and shareholders of the third respondent.

The applicant, the first and second respondents entered into two agreements dated 28 February 1979 and 25 February 1980 which provide that any dispute and question arising from the said agreements be referred to a single arbitrator.

Disputes arose between the parties and arbitration proceeding were commenced before the late Dato' Ronald TS Khoo ('the first arbitrator') in March 1988. On 24 November 1989, the first arbitrator handed down an interim award, under which it was declared, inter alia, that the applicant is entitled to dividends from the third respondent company.

From 1990 to 1998, the first arbitrator continued to hear the parties on the issue of the reliefs to be ordered pursuant to the findings in the interim award. While the arbitration proceedings were so pending, the first and second respondents on 10 November 1992, passed a board of directors' resolution to award themselves 'salaries' in differing amounts which affected the amounts of monies in the accounts of the third respondent company. A similar resolution was passed in 1997.

The applicant raised the issue of 'retrospective salaries payments' before the first arbitrator who agreed to try the issue as part of the reliefs to be awarded in his final award. The issue was of significance to the question of reliefs as it affected, inter alia, the total amount of monies available as reserve in the third respondent company which could be distributed by way of dividends.

In March 1998, the first arbitrator passed away and another arbitrator ('the second arbitrator') was subsequently appointed to act in place of the first arbitrator by the parties to conclude the arbitration including the determination of reliefs.

The second arbitrator heard submissions on the issue of the first and second respondents awarding themselves retrospective salaries and handed down his award on 24 March 2000, holding that the retrospective award of salaries was within the authority of the board of directors of the third respondent and was therefore valid. In view of this finding, the second arbitrator declined to grant the order sought by the applicant, namely, that the first and second respondents repay the monies they had withdrawn as retrospective salaries back to the third respondent company.

In doing so, the second arbitrator rejected the contention raised by the applicant that the 'remuneration' sought to be drawn by the directors required the approval of the shareholders at a general meeting of the company and which approval had not been obtained in the present instance.

In the case before me, counsel for the respondents has faulted the applicant for relying on the remedy of 'error of law on the face of the award' to set aside the award of the second arbitrator. The argument is that Malaysia has a legislation, the Act, which does not provide for such a remedy and therefore the remedy cannot be engrafted on to the legislation.

By virtue of the Arbitration Ordinance (Extension) Order 1972 (see PU(A) 162/1972) ('the Ordinance') which came into force on 1 November 1972, the Arbitration Ordinance of Sarawak (but not any rules of court made under the Ordinance) was extended to apply throughout Malaysia and the Arbitration Ordinance 1950 of the Federation of Malaya and the Arbitration Ordinance of Sabah were repealed.

The extended Ordinance has since been revised. Nowhere in the Act has the remedy of 'error of law on the face of the award' been provided. In 1971, in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, an arbitration matter came up before the High Court and obviously, although the legislation under which the matter was brought up before the court was not mentioned in the judgment, the legislation under which the court took cognizance of the matter was the Arbitration Ordinance 1950 (now repealed). Under that Ordinance, there was also no provision made in regard to the remedy of error of law on the face of the record. Nevertheless, Raja Azlan Shah J (as he then was) had this to say at p 211:

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC

592, *British Westinghouse Electric & Manufacturing Co Ltd v Underground Railways Co of London Ltd* [1912] AC 673, *Hodgkinson v Fernie* 3 CB (NS) 189, 140 ER 712, and *Attorney General for Manitoba v Kelly and Ors* [1922] 1 AC 268 at p 281 (PC), *Government of Kelantan v Duff Development Co Ltd* [1923] AC 395 at p 411 and *Re King & Duveen* [1913] 2 KB 32 are instances of the latter.

In the present case, I have on consideration come to the conclusion that no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally, and indeed necessarily, arose in applying ascertained facts. The reference involved both composite questions of law and fact. *The court can therefore review the award if and when there is error apparent on the face of the award.* (Emphasis added.)

It is implicit that his Lordship was of the view that the remedy of error of law may be resorted to notwithstanding an absence of a provision for that remedy in the Arbitration Ordinance 1950. It has to be borne in mind that the relevant English cases before the coming into force of the English Arbitration Act 1979 ('the 1979 Act') were decided on the basis of common law although there was existing legislation and there was no provision therein for this common law remedy. The 1979 Act abolished this remedy (more about this later).

The Supreme Court in 1972, in *Pacific & Orient Insurance Co Sdn Bhd v Woon Shee Min* [1980] 1 MLJ 291 considered an arbitration matter where obviously the Act was considered. The Federal Court was fully aware that the Act does not provide for the remedy of error of law on the face of the award but the court, nevertheless, considered the case on the basis that the remedy is available under our law. The court did not allow the appeal against the judgment of the High Court, Johore Bahru dismissing an application by the appellant company to set aside the award of the arbitrator.

This is what Wan Sulaiman FJ stated:

After hearing evidence from both sides the arbitrator Mr Chelliah Paramjothy, a senior lawyer, gave his award on 20 July 1976.

Upon the basis that the respondent has a right to be indemnified by the appellant company for the damage to motor vehicle his award was that the appellants should pay to the respondent the sum of RM8,000 'on a total loss basis' for the motor vehicle. Section 24(2) of the Arbitration Act reads 'where an arbitrator … has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside'. This subsection is almost identical in wording with the English s 23(2).

However, it appears from Mr Ball's opening words that it is not on this ground that the appellants depended to have the award set aside but on the inherent power of the court to set aside an award which is bad on the face of it, as involving an apparent error in fact or in law. (See *Russell on Arbitration* (18th Ed) p 349). At p 357 of the same volume appears this passage:

'An award which, on its face, fails to comply with the requirements of a valid award, will be remitted or set aside. By a somewhat anomalous extension of this rule, notwithstanding that an arbitrator's decision is in

> general final, if an error either of fact or law is allowed to happen on the face of the award, this is a ground for setting it aside …'

Over the years, the courts in Malaysia have regularly considered arbitration applications on the basis that the remedy of error on the face of the award is available for consideration under our law. In *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, the Supreme Court referred to *Sharikat Pemborong Pertanian & Perumahan* and accepted that the remedy of error of law on the face of the award is available to be considered.

In a more recent case, *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 at p 488, the Court of Appeal recognized that the jurisdiction of the ordinary courts in the environment of private arbitration stems from statute and common law.

As I see it, the availability of the common law remedy is so deeply entrenched in our law and the decisions of the appellate courts binding on the High Court that short of a provision similar to s 1(1) of the 1979 Act which provides that the High Court shall not have jurisdiction to set aside or remit an award in the arbitrator's agreement on the ground of errors of fact or law on the face of the award, the courts here have the jurisdiction to set aside an award on the ground of error of law on the face of the award.

The objection is overruled.

Objection overruled.

Reported by Ezatul Zuria Azhari